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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

THE E. KAHN'S SONS COMPANY, an Ohio Corporation,
Petitioner,

v.

CHESTER BOWLES, Price Administrator, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, The E. Kahn's Sons Company, an Ohio corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in the above-entitled case March 29, 1945. On May 1, 1945, the Emergency Court of Appeals denied petitioner's petition for rehearing and motion for vacation of judgment.

Opinion Below.

The opinion of the Emergency Court of Appeals, not yet reported, appears in the record, p. ~~448~~ 446

Statute Involved.

The statute involved is the Emergency Price Control Act of 1942 as amended (50 App. U. S. C., 901, 902, 923, 924, 963), the pertinent provisions of which are printed in the appendix to this petition.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942 (50 App. U. S. C., Sec. 924(d)) and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347).

Statement.

On April 1, 1943, The E. Kahn's Sons Company filed with the Price Administrator its formal protest against the wholesale prices for fresh beef provided by Revised Maximum Price Regulation No. 169—Beef and Veal Carcasses and Wholesale Cuts, issued December 10, 1942.* The protest was denied on October 27, 1943, and a complaint was filed with the United States Emergency Court of Appeals on November 26, 1943, appealing from such denial. Upon leave granted by the Court, complainant filed with the Price Administrator additional evidence. The protest proceedings were thereupon reopened, the additional evidence received, and the protest was denied upon reconsideration April 24, 1944.

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* This regulation is sometimes hereinafter referred to as RMPR No. 169.

Following hearing, the Emergency Court rendered its opinion on March 29, 1945, and entered a judgment dismissing the complaint. On April 9, 1945, complainant petitioned the Court to grant rehearing and to vacate the judgment. The petition was denied by order dated May 1, 1945. In the Emergency Court petitioner's case, No. 103, was consolidated for hearing and disposition with No. 102. They had been considered on a common record by the Price Administrator and were considered on a common record by the Court. A separate order was entered in No. 103, however, dismissing that complaint while the complaint in No. 102, involving among other complainants two so-called non-processing cattle slaughterers, was not dismissed but is still pending on rehearing.

The Emergency Court sustained the validity of the maximum price regulation and dismissed petitioner's complaint on the following grounds:

1. That the prices on fresh beef are "generally fair and equitable" and allow "a generally fair and equitable margin" for processing, as required by the statute, if (a) "cattle operations as an entirety" yield as much as "out-of-pocket costs", and (b) the "over-all" earnings of the industry as a whole from all operations are above a normal peacetime level. This rule had been announced in *Armour and Company* v. *Bowles*, No. 101, decided the same day. "Out-of-pocket" costs were defined as including direct labor and materials but as excluding administrative and selling expenses.

2. That complainant had not made an accounting allocation to show that the yield of its "cattle operations as an entirety" were less than its "out-of-pocket" expense. "Cattle operations as an entirety" for the industry as a whole include the manufacture of leather, soap, canned meats, etc. which, while made by Armour and Company, are not made by the hundreds of typical and representative packers whose losses in producing fresh beef were demonstrated by complainant.

3. That complainant's evidence (based on the long-established and standard accounting method followed by the industry in determining the results of fresh beef operations), which showed that complainant and typical and representative packers throughout the industry were suffering heavy losses in producing fresh beef, should be rejected because the accounting method employed "is not an acceptable yardstick for determining whether the regulation establishes generally fair and equitable maximum prices." (Quotation from *Armour case.*)

The Emergency Price Control Act of 1942 authorizes the Price Administrator to establish and maintain only those prices which are "generally fair and equitable" (Sec. 2(a)), and by a special amendment, known as the McKellar amendment, requires that as to prices on products "resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing." (Stabilization Act of 1944, Sec. 3.)

The primary question presented is whether prices for "cattle operations as an entirety" may be maintained below the cost of production and as low as the "out-of-pocket" expense because the industry as a whole from other and unrelated operations is obtaining sufficient profits to make its "over-all" earnings as much or more than were obtained in peacetime.

The second fundamental question presented is whether the maximum prices for a major product of the packing industry—fresh beef—may be fixed or maintained in disregard of the cost of producing fresh beef, and whether the Price Administrator may employ the profits from other cattle operations, not related to fresh beef operations, to offset losses on fresh beef under the maximum prices and thereby bring the returns of the "cattle operations as an entirety" up to "out-of-pocket" expense. It is complainant's position that the requirements of the statute have not been met by prices for major products which do not provide full cost plus a margin for processing; and that maximum

prices imposing losses on major products cannot be justified by "over-all" earnings or by profit margins on unrelated products.

A third fundamental question is whether the Price Administrator may employ the operations of a few large packing companies who engaged in many industries, including the manufacture of leather, soap, and canned goods, not engaged in by hundreds of typical and representative packers, in arriving at "generally fair and equitable" prices for fresh beef for the industry as a whole, or whether the prices on fresh beef must be "generally fair and equitable" considering the operations of the hundreds of independent packing companies.

A fourth fundamental question is whether the Price Administrator may maintain as to companies producing more than one product, known as multi-product companies, maximum prices on major products below the cost of production while for single-product companies a special subsidy is paid on such major products to compensate for such losses and to provide a margin for processing.

The protest and complaint of your petitioner against the fresh beef prices maintained by RMPR No. 169 was supported by evidence showing that petitioner and representative and typical packing companies throughout the industry were suffering heavy losses in the production of fresh beef. Employing the Price Admnistrator's calculations these losses were approximately $10 per head when cattle were purchased at ceiling prices and the companies could do no more than break even when cattle were purchased at the minimum prices permitted under the cattle-stabilization program. The losses by the typical and representative packer as shown by complainant's evidence were much higher, being $17 per head when cattle were purchased at ceiling prices and with a loss of approximately $7 per head even when cattle were purchased at minimum prices under the cattle-stabilization program. Petitioner's evidence consisted not only of figures showing its own operations and

losses but also of an affidavit prepared by the Accounting Committee of the National Independent Meat Packers Association showing losses under the maximum prices for fresh beef for typical and representative packers in all price zones throughout the United States. In the following table we show the losses as disclosed by petitioner's evidence in the territory in which petitioner's plant (Cincinnati—Zone 15) is located (R. ~~248-253~~ 250-255):

Loss Per Cwt., Beef Carcasses

	At Maximum Cattle Price	At Minimum Cattle Price
Grade AA—Choice	$2.89 loss	$1.25 loss
Grade A—Good	3.12 loss	1.40 loss
Grade B—Commercial	3.07 loss	1.29 loss
Grade C—Utility	3.00 loss	1.15 loss

The evidence shows similar losses for typical and representative packing companies located in all price zones throughout the United States.

The losses stated were arrived at by employing the long-established accounting method followed by the packing industry in determining the cost of producing fresh beef. This accounting method treats the operations of the beef department of a multi-product company as standing on its own basis in the same way as if it were a separate business. The method is known as the cut-out test method and the beef department is credited with the products produced by it in the same manner as though it were a separate enterprise. While the larger packing companies engage in substantial processing of the by-products of cattle slaughter, the typical and representative packing company does not. As to the typical and representative packing company, the cut-out test method actually reflects their "cattle operations as an entirety" except for the manufacture of sausage. Petitioner's evidence showed that in the typical and representative packing company the manufacture of sausage bears a negligible relation to the production of fresh beef.

Only a very small amount of material is obtained in the production of fresh beef which is used in the manufacture of sausage. The beef utilized in the manufacture of sausage is obtained from different and lower grades of cattle than those slaughtered for the purpose of producing fresh beef.* Petitioner's evidence also showed that it was impossible for the typical and representative packer to recover his fresh beef losses by any amount of profit on the small quantity of material obtained in the fresh beef operation and utilized in the manufacture of sausage.

The cut-out test method of cost determination employed by the industry was rejected by the Price Administrator on the ground that it failed to reflect profits from extensive by-product processing engaged in by the largest packing companies. Petitioner's evidence showed that such processing was not conducted by the typical and representative packer and that as to them, the standard accounting method reflected "their cattle operations as an entirety" except for the independent sausage operations having no material relation to fresh beef production. The Price Administrator and the Court below thus have rejected the long-established and standard accounting method followed by the industry although the Emergency Price Control Act (Sec. 2 (h)) provides:

> "The powers granted in this section shall not be used or *made to operate to compel changes in business prac-*

* That different grades of cattle are used for sausage manufacture than for fresh beef was recognized by the Court below in No. 96, *Armour Co.* v. *Bowles,* involving sales of fresh beef to the government. The Emergency Court in No. 96 found as a fact that the maximum prices had "substantially impeded" the production of fresh beef, saying:

> "It seems clear that the established maximum prices during the period now in question constituted a substantial impediment to the slaughtering of animals yielding carcasses of the grades required by the government contracts. With results so unfavorable in the better grades, the natural consequence was a greater concentration on the slaughter of the lower and less expensive grades yielding the type of meat found in sausage, hamburger, canned meats and other processed products."

tices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act." (Italics supplied)

The Price Administrator recognized the standard accounting method, the cut-out test, as sound for that part of the industry engaged only in the production of fresh beef. The record shows that there are hundreds of such companies. (R. 323-324). In fact, the Administrator employed that method in having established for such single-product companies a special subsidy of 80 cents per cwt. on the weight of cattle slaughtered so that such companies might not suffer losses in producing fresh beef. The standard accounting method was rejected *only as to part of the industry*, namely, as to those companies which, in addition to producing fresh beef, also produce other products involving the processing of beef.* The real reason for the rejection by the Price Administrator of the standard accounting method is, therefore, not that it is unsound but that it determines the cost of producing fresh beef separately, whereas the Price Administrator rejects any determination of such costs and insists that all operations of the industry be considered in the aggregate and that any price, however low, is "generally fair and equitable" if "over-all" earnings of the industry as a whole from all operations equal or exceed the peacetime level.

The Emergency Court has modified the Price Administrator's position only slightly. It has sanctioned the mainte-

* It should be emphasized that fresh beef is the primary product of cattle slaughtering. The Price Administrator in his Statement of Considerations issued with the price regulations stated: "It is estimated that about 90% of beef is marketed as fresh meat, the remaining 10% consisting mostly of pickled, smoked, and canned products" (R. 166). When the typical animal is slaughtered the packer obtains the following products: a carcass to be sold fresh at a ceiling price of approximately $120; a hide with a value of $8.50; and other by-products with a value in the aggregate of less than $12.

nance of prices on a major product of the packing industry (having a value at ceiling prices of approximately one billion dollars annually) *at less than out-of-pocket cost* if "cattle operations in their entirety" yield as much in the aggregate as out-of-pocket costs on such operations and profits of the industry as a whole from unrelated operations are sufficient to provide an "over-all" profit equal to the peacetime level. In addition, the Court approved the use by the Administrator of the "cattle operations" of the few large packers as representative for the industry as a whole although such operations include manufacturing activities of other industries in which the hundreds of typical and representative packers do not engage, such as the manufacture of leather, soap, glue, and canned meats. In announcing and applying the rule in the *Armour case* the Court employed the operations of a single company, Armour and Company, which include these unrepresentative activities; but in its consideration of petitioner's complaint the Court failed to give effect or to consider petitioner's evidence that the cut-out accounting method does include "cattle operations in their entirety" as conducted by the typical and representative packer except for the manufacture of sausage which, while involving cattle of other grades not used in fresh beef production, bears no material relation to fresh beef production. Petitioner's evidence showed that in the case of its own operations the losses on fresh beef could not be overcome by its profits from sausage.

The Questions Presented.

The petition presents the following fundamental questions:

1. Are the maximum prices on fresh beef maintained by RMPR No. 169 "generally fair and equitable" and do they provide "a generally fair and equitable margin for . . . processing" when such maximum prices yield less than the out-of-pocket costs of production?

2. Are the maximum prices on fresh beef maintained by RMPR No. 169 "generally fair and equitable" and do they provide "a generally fair and equitable margin for . . . processing" when "cattle operations as an entirety" yield no more than out-of-pocket costs under the maximum prices?

3. Are the fresh beef prices maintained by RMPR No. 169 "generally fair and equitable" and do they provide "a generally fair and equitable margin for . . . processing" for the industry as a whole when measured by the "cattle operations" of a few large packers which include manufacturing operations utilizing the by-products of cattle slaughter which are not engaged in by the hundreds of independent packing companies?

4. May the Price Administrator refuse to determine the cost of producing fresh beef separately and maintain on fresh beef prices below cost, such losses to be made up from other operations unrelated to fresh beef production?

5. May the Price Administrator reject the long-established method of cost accounting established in the industry?

Reasons for Granting the Writ.

The decision of the Emergency Court of Appeals has approved a novel rule of law without precedent in the field of government regulation, namely, that private property may be required to be sold at less than the cost of production. It has announced this rule as applicable to price fixing under the Emergency Price Control Act which applies to the sale of all commodities sold within the United States. This extraordinary rule has been applied in the present case to maximum prices on one of the most important major products of the third most important industry in the nation, a product needed by every household in the land. The ruling should be reviewed by the Supreme Court, both because of its importance to the industry involved and also because the ruling is applicable to all prices fixed or maintained by the Price Administrator under the statute and sold by

industries producing more than one product. The ruling should also be reviewed because it has no precedent in American jurisprudence and is contrary to the whole body of law that governmental authority may not be so used as to appropriate private property without just compensation.

The Emergency Price Control Act requires that prices shall be "generally fair and equitable" and as to the "*products*" of livestock a special amendment requires that "a generally fair and equitable margin for . . . processing" shall be allowed. The Price Administrator with the approval of the Emergency Court has, we believe, asserted and exercised a power not granted, namely, the control of profits and the national economy, in disregard of the limitation of the Price Administrator's power to the fixing of generally fair and equitable *prices*. The grant of such sweeping economic power to the Price Administrator is of such great public importance that it should be confirmed in him only upon the clearest statutory authority and only after the most thorough consideration by the highest court of the Constitutional issues presented.

Wherefore the petitioner prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in this case March 29, 1945.

Respectfully submitted,

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Dated: May 29, 1945.